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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 196

SOUTHERN MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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SOUTHERN MANUFACTURING COMPANY,
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NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Southern Manufacturing Company, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered February 16, 1940 (R. 70), enforcing an order of the respondent, National Labor Relations Board, passed against petitioner on June 15, 1939 (R. 22); and to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered April 3, 1940 (R. 82) denying petitioner's petition for suspension of the decree of February 16, 1940, and for a rehearing thereon.

Statement.

The petitioner is an employer, subject to the terms and provisions of the National Labor Relations Act (49 Stat.

449, U. S. C. A., Title 29, Sections 151-166) (R. 46). On May 24, 1938, a charge was filed before the National Labor Relations Board against petitioner by Amalgamated Clothing Workers of America, alleging unfair labor practices by petitioner (R. 17). On September 13, 1938, an amended charge was filed (R. 13). On March 21, 1939, *before any complaint was issued* by the Labor Board, a settlement of the controversy was reached, and the terms thereof embodied in a Stipulation (R. 3). The petitioner agreed to the form of an Order to be entered by respondent against it, requiring that petitioner cease and desist from certain unfair labor practices, and that petitioner employ certain named persons *on or before April 24, 1939* (R. 4). The terms of the Stipulation not included in the form of the Order agreed upon were explanatory of and interpretative of the duties of petitioner in complying with the Order (R. 5). In the Stipulation petitioner consented to the entry by the United States Circuit Court of Appeals for the appropriate circuit, upon application by the Board, of a consent decree enforcing an Order of the Board in the form set forth and waived further notice of the application for such decree (R. 6). This consent was given with the understanding by representatives of petitioner that there would be no enforcement unless petitioner acted contrary to the agreed Order, and the interpretative terms of the Stipulation (R. 36). Petitioner complied with the terms of the Order and settlement Stipulation before April 24, 1939 (R. 36). *On April 27, 1939, respondent issued its Complaint against petitioner,* and gave notice of a hearing to take place May 3, 1939, in the office of the Chief Trial Examiner in Washington, D. C. (R. 9). Before the issuance of the Complaint and the service of the notice of hearing, however, respondent, through its Executive Secretary, notified the petitioner that such Complaint would issue and such hearing would be had "for the single purpose of introducing

into the record the Stipulation signed by the parties" (Exhibit C, Answer, R. 37). On May 3, 1939, the formal hearing occurred upon which nothing took place other than the filing of the Stipulation (R. 1). On June 15, 1939, the formal Order, as provided in the Stipulation, was entered (R. 22). On July 27, 1939, the respondent filed with the United States Circuit Court of Appeals for the Sixth Circuit its petition for enforcement of the Order entered June 15, 1939 (R. 29). *There was no allegation that any order or decree of the respondent had been violated, or that any violation was threatened, or that any unfair labor practice was then occurring* (R. 29). Petitioner replied that it had complied in detail with the terms of the settlement Stipulation (R. 33), and resisted the entry of the Order of enforcement on the following grounds:

1. There is no present justiciable controversy. No act is being done or threatened in violation of the Board order or the National Labor Relations Act (R. 55).

2. The enforcement prayed is not the enforcement intended by the National Labor Relations Act. See Title 29, Sec. 160 (e), U. S. C. A.; Sec. 10 (e), 49 Stat. 453 (R. 55).

3. The entry of this decree of enforcement, even if allowable, is a matter of discretion, and it will not be entered where the Board has failed to act promptly, and where there is no allegation of disregard of or failure to comply with the order (R. 55).

4. A decree of enforcement of the Board's order is sought without giving to the respondent the benefit of those provisions of the Stipulation which are essentially interpretative of, and a part of the Board's order (R. 55).

On February 16, 1940, the United States Circuit Court of Appeals for the Sixth Circuit entered its Order enforc-

ing the Order of the Board (R. 70). Thereafter on February 23, 1940, petitioner filed its petition for suspension of this decree and a rehearing, pointing out that on October 13, 1939, the court had considered the matter, and without entering a formal order had declined to enter the Order of enforcement. Petitioner relied upon its original objection to the entry of the Order, which the court had sustained on October 13, 1939, and prayed a reconsideration of the court's action, and a rehearing (R. 72). On April 3, 1940, the court denied the petition for a suspension of the decree, and for a rehearing (R. 82).

Question Presented.

Under the foregoing circumstances upon the record presented, should the United States Circuit Court of Appeals for the Sixth Circuit have entered its Order enforcing the Order of the National Labor Relations Board?

Statute Involved.

> "(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon

shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

Sec. 10(e) 49 Stat. 449; U. S. C. A. title 29, Sec. 160(e).

Reasons for Granting the Petition.

1. The court erred in entering its Order enforcing the Order of the National Labor Relations Board, there having been no labor controversy pending at the time of the issuance of the Board's Complaint, and there being no violation or threatened violation of the Board's Order when the petition for enforcement was filed.

2. The delay between the time of the signing of the settlement Stipulation and the filing of the petition for enforcement with no allegation that petitioner was disregarding the Board's order, or had failed to comply therewith, required the dismissal of the Board's petition for enforcement. This position is supported by the decision of the United States Circuit Court of Appeals for the Third Circuit, in the case of *National Labor Relations Board* v. *LaSalle Hat Company*, 105 F. (2d) 709, 710.

3. There is a difference of opinion between the various United States Circuit Courts of Appeal and the judges thereof as to whether or not following an order of the National Labor Relations Board, based upon a settlement stipulation, the court should entertain a petition for an enforcement of said order without something in defiance of that order appearing. In *National Labor Relations Board* v. *Pure Oil Company*, 103 F. (2d) 497, the majority of the court held that the petition should be granted, and the order of enforcement entered. In the same case, *National Labor Relations Board* v. *Pure Oil Company*, 103 F. (2d) 497, 498-499, there was a strong dissenting opinion that under the circumstances there was no justiciable controversy shown. The United States Circuit Court of Appeals for the Seventh Circuit, in *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663, held that under these circumstances the

order of enforcement should be entered by the court, basing its opinion upon the analogy of a ruling of that court under the enforcement provisions of the Federal Trade Commission Act, 38 Stat. 717, U. S. C. Title 15, Sec. 45, the case being *Fairyfoot Products Company* v. *Federal Trade Commission,* 80 (7th Circuit) F. (2d) 684. This Court failed to note in its opinion that the case relied upon came on to be heard further under the style *Federal Trade Commission* v. *Fairyfoot Products Company* (7th Circuit), 94 F. (2d) 844, in which latter case the court expressly approved the rule adopted in the case of *Silver Company* v. *Federal Trade Commission,* 292 Fed. 752, and *Butterick Co., et al.* v. *Federal Trade Commission,* 4 F. (2d) 910, certiorari denied, 267 U. S. 602, 69 Law Ed. 808, to the effect that the parties to a petition for enforcement appeared in the nature of parties to a suit in equity, and in order for the order of enforcement to issue there must be some allegation of a violation or threatened violation of the order of the Board or Commission.

4. The Order of enforcement should not have been entered by the United States Circuit Court of Appeals for the Sixth Circuit without giving effect to or incorporating therein the provisions of the Stipulation interpretative of the method of performing the affirmative actions required of petitioner by the Board's Order (R. 7). There is no official report of the Order in the United States Circuit Court of Appeals in this case.

5. The facts of this case are not controlled by the holding of the United States Supreme Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 82 Law Ed. 831, and *Federal Trade Commission* v. *Goodyear Tire & Rubber Company,* 304 U. S. 257, 82 Law Ed. 1326. In the first named case it is apparent that

at the time the Board filed its petition in the United States Circuit Court of Appeals for the Third Circuit for enforcement of its Order, the Pennsylvania Greyhound Lines was bitterly contesting the Order. In the case of *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U. S. 257, 82 Law Ed. 1326, the Goodyear Tire & Rubber Company was itself petitioner before the United States Circuit Court of Appeals for the Sixth Circuit, asking a review of the action of the Federal Trade Commission at the time of the passage of the Act of Congress which the Goodyear Tire & Rubber Company insisted made the litigation a moot question. In the case at bar the entire controversy had been settled under the supervision of the National Labor Relations Board on March 21, 1939, and the settlement completed on April 24, 1939 before the Board issued its formal Complaint on April 27, 1939.

6. The ruling of the United States Circuit Court of Appeals for the Sixth Circuit if allowed to stand will have far reaching effects. It will discourage the settlement of charges pending before the National Labor Relations Board before a Complaint is issued, for the very purpose of such settlement is to avoid government by injunction under an order of enforcement of a United States Circuit Court of Appeals. If the ruling is allowed to stand the United States Circuit Court of Appeals becomes a mere registry for the orders of the National Labor Relations Board, and businesses which have compromised and settled their difficulties with their employees under the supervision of the National Labor Relations Board find themselves living thenceforth forever subject to the injunctive processes of the United States Circuit Court of Appeals, and the probability of a contempt proceeding at the instance of any disgruntled employee. The effect thus is far reaching and is most important when settlement of charges filed by employees

against employers should be encouraged before a Complaint is issued by the National Labor Relations Board, and all parties put to the expense of a costly hearing.

Your petitioner appends hereto its brief in support of this petition.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

COCHRAN & WHITE,
CHAS. C. TRABUE, JR.,
Solicitors for Petitioner.

June 27, 1940.